FILED

No. 661

INTERNATIONAL MILLING COMPANY, Petitioner,

vs.

COLUMBIA TRANSPORTATION COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA AND BRIEF IN SUPPORT THEREOF.

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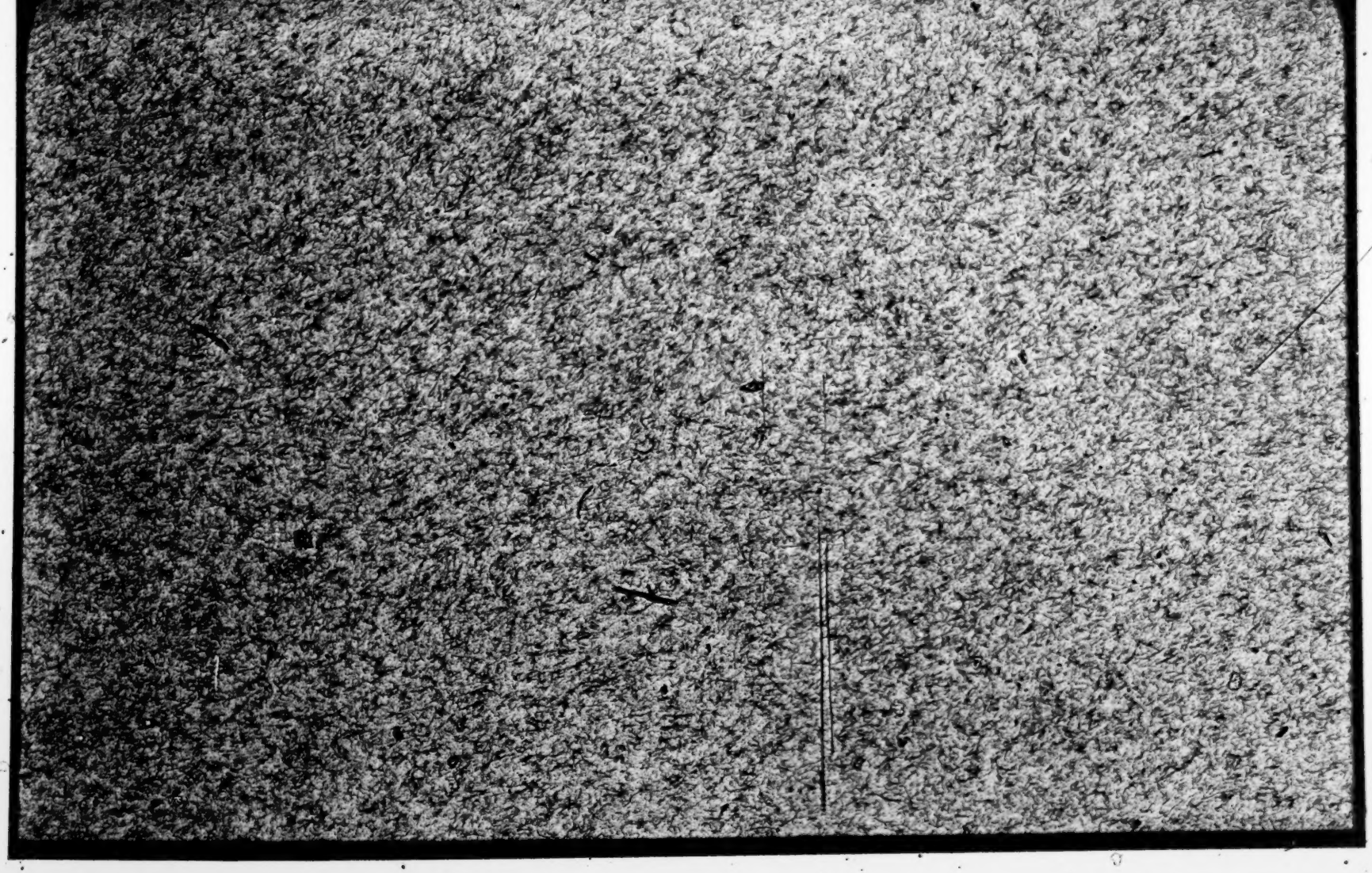

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 561

INTERNATIONAL MILLING COMPANY, A CORPORATION, PETITIONER,

vs.

COLUMBIA TRANSPORTATION COMPANY, A CORPORATION, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of International Milling Company, plaintiff in the above entitled proceeding, respectfully represents as follows:

I.

Summary Statement of the Matter Involved.

The above entitled proceeding is an action at law by International Milling Company, a Delaware corporation, duly qualified to do business in Minnesota, as plaintiff, against Columbia Transportation Company, a Delaware corpora-

tion not qualified to do business in Minnesota (but which operates its vessels in interstate commerce over Minnesota waters), as defendant, to recover for damage to a cargo of wheat while stored in the steamer "W. C. Richardson" at South Chicago, Illinois, from about January 1, 1930, to May 1, 1930. Jurisdiction of the defendant to the extent of the property attached was acquired through the attachment of one of the vessels of the defendant company, the steamer "C. Russell Hubbard" (R. 12).

It appears without dispute that the attachment and service of process was made while the vessel was upon waters over which the State of Minnesota has jurisdiction, pursuant to Article II, Section 2, of the Constitution of Minnesota, which reads as follows:

> "The State of Minnesota shall have concurrent jurisdiction on the Mississippi and all other rivers and waters bordering on the said State of Minnesota, so far as the same shall form a common boundary to said state, and any other state or states now or hereafter to be formed by the same; and said rivers and waters, and navigable waters leading into the same, shall be common highways and forever free, as well to the inhabitants of said state as to other citizens of the United States, without any tax, duty, impost, or toll therefor."

Boundaries of the state are fixed and determined by Section 1 of the same Article, which, in part, reads as follows:

> "* * * thence east along the northern boundary of said state to the main channel of the Mississippi River; thence up the main channel of said river and following the boundary line of the State of Wisconsin until the same intersects the St. Louis River; thence down the said river to and through Lake Superior, on the boundary line of Wisconsin and Michigan, until it intersects the dividing line between the United States

and British possessions; thence up Pigeon River and following said dividing line to the place of beginning."

Immediately after the levy and attachment and service of the summons and complaint, the defendant filed an undertaking in the sum of $40,000 (R. 15), for the release of the attachment; and the court thereupon ordered the attachment released (R. 17). The defendant, appearing specially, then secured an order to show cause (R. 17) why an order should not be made setting aside the service of the summons and vacating and setting aside the attachment upon the following grounds:

1. That such an order had been previously entered in a case between the same parties, involving the same matter, and was therefore *res adjudicata*. This point was not discussed or referred to by the trial court in its order, nor by the Supreme Court of Minnesota in its opinion, and is not here involved.

2. That the service and levy of the attachment operated to place an unreasonable burden upon interstate commerce.

3. That the service of the summons and the prosecution of the action operated to place an unreasonable burden upon interstate commerce.

This motion, which was heard upon affidavits and oral testimony, was granted (R. 96), "on the ground and for the reason that said purported service and levy of attachment and purported service of summons in the main action and the prosecution of said action in this Court operate to place unreasonable conditions, burdens and restraints upon interstate commerce, in violation of the provisions of Article I, Section 8, subdivision 3 of the Constitution of the United States."

Upon appeal by the plaintiff to the Supreme Court of Minnesota, this order was affirmed by a divided court, three of the seven justices dissenting, said appeal being Docket No. 29466 in the Minnesota Supreme Court.

Thereafter judgment was entered in the trial court, from which a second appeal was taken for jurisdictional purposes, and resulted in affirmance of the judgment on the basis of the court's previous decision. This second appeal was No. 29814 on the docket of the Supreme Court of Minnesota.

A certified copy of the entire record of the case in the District Court of St. Louis County, Minnesota, and in the Supreme Court of Minnesota is submitted herewith, including both Appeal No. 29466 and Appeal No. 29814 in said Supreme Court.

The sole question involved is whether the prosecution in Minnesota of a transitory cause of action by a foreign corporation duly qualified to do business within the state, against a foreign corporation not qualified to do business in the state but which operates, in interstate commerce, a line of vessels throughout the navigation season to and from Minnesota ports and upon waters over which the State of Minnesota has jurisdiction, upon a cause of action which arose without the state, and wherein jurisdiction was obtained by the attachment of property within the state to the extent of such property, imposes an unreasonable obstruction or undue burden upon interstate commerce, in violation of the commerce clause of the Constitution (Article I, Section 8, subdivision 3).

It was the contention of the petitioner that under the decisions of this Honorable Court no unreasonable burden was so imposed and that the cause was one which could be tried within the State of Minnesota without violation of the commerce clause.

The decisions upon which such reliance was placed are the following:

Davis v. *Farmers Co-operative Co.*, 262 U. S. 312;
Atchison, T. & S. F. R. Co. v. *Wells*, 265 U. S. 101;
Missouri ex rel. St. Louis B. & M. R. Co. v. *Taylor*, 266 U. S. 200;
Hoffman v. *Missouri ex rel. Foraker*, 274 U. S. 21;
Michigan Central Railroad Co. v. *Mix*, 278 U. S. 492;
Denver & R. G. W. R. Co. v. *Terte*, 284 U. S. 284.

Reasons Relied Upon for Allowance of the Writ.

While the question presented by this record has not been passed upon by this Honorable Court under a state of facts precisely the same as that here involved, it is believed by the petitioner that the decision of the Supreme Court of Minnesota is contrary to the principles announced by this Court in the foregoing cases.

The question presented is of great and general importance, not only as it affects the propriety of prosecuting such actions against interstate carriers upon the Great Lakes in states over whose waters such carriers operate, but because of the growing importance of the question as it may involve interstate commerce by air, truck and bus.

Furthermore, this is a case directly within Rule 38 (former Rule 35) Section 5 (*a*), of the Rules of this Court, which indicates the character of reasons which will be considered by this Court for the allowance of a review on writ of certiorari, to wit:

> "Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

The scope and meaning of the decisions above cited should be determined and defined as applied to the situation

presented by this record and the question settled by this Court.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Minnesota, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in this case Number 29466 on its docket, including case Number 29814, entitled "International Milling Company, a corporation, appellant, *vs.* Columbia Transportation Company, respondent", and that such judgment of the Supreme Court of Minnesota may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just.

INTERNATIONAL MILLING COMPANY,
Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 561

INTERNATIONAL MILLING COMPANY,
A CORPORATION, PETITIONER,

vs.

COLUMBIA TRANSPORTATION COMPANY,
A CORPORATION, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The first appeal to the Supreme Court of Minnesota was from the order of the district court vacating and setting aside the service of the summons and a simultaneous levy under a writ of attachment. The opinion of the Minnesota Supreme Court is reported in 250 N. W. 186, and also appears, commencing on page 102*a*, in the record.

After the affirmance of this order, a judgment was entered in the trial court, from which a subsequent appeal was taken to the Supreme Court of Minnesota, the purpose

being to give finality to the decision. The *per curiam* opinion by which the Minnesota Supreme Court adheres to its former ruling is reported in 250 N. W. 186, and also appears in the record, commencing at page 115.

II.

Jurisdiction.

1. The date of the judgment to be reviewed, being that rendered by the Supreme Court of Minnesota, in the second appeal numbered 29814, from the final judgment of the District Court of St. Louis County, is October 17, 1933 (R. 116).

2. The specific claims advanced and rulings made in the lower court which are relied upon as the basis of this Court's jurisdiction are as follows:

After the service of the attachment and of the summons, the defendant, in the trial court, gave a bond for the release of the attachment, and, having secured such release, appeared specially and moved for an order setting aside the service of the summons and vacating the attachment on the grounds:

(*a*) That the levy of the attachment operated to place an unreasonable burden upon interstate commerce; and,

(*b*) That the service of the summons and prosecution of the action operated to place an unreasonable burden upon interstate commerce.

After a hearing, the trial court granted said motion upon the specific grounds above mentioned. This ruling having been affirmed by the Supreme Court of Minnesota, a judgment was entered in the lower court, which was affirmed by the Supreme Court of Minnesota, as above stated.

There was thus specially set up and claimed by the defendant a right, privilege or immunity under the Federal Constitution.

3. The statutory provisions under which the jurisdiction of this Court is invoked are Judicial Code, Sec. 237, as amended by Act of February 13, 1925, 43 Stat. 937, U. S. C. A., Title 28, Sec. 344.

4. Cases believed to sustain the jurisdiction of this Court are as follows:

Davis v. *Farmers Cooperative Co.*, 262 U. S. 312;
Atchison, T. & S. F. R. Co. v. *Wells*, 265 U. S. 101;
Missouri ex rel. St. Louis B. & M. R. Co. v. *Taylor*, 266 U. S. 200;
Hoffman v. *Missouri ex rel. Foraker*, 274 U. S. 21;
Michigan Central Railroad Co. v. *Mix*, 278 U. S. 492;
Denver & R. G. W. R. Co. v. *Terte*, 284 U. S. 284;

in all of which the jurisdiction of this Court was invoked by certiorari or by writ of error, to determine the question of whether or not the prosecution of the particular action involved operated to place an undue burden upon interstate commerce, in violation of the commerce clause of the Constitution.

III.

Statement of the Case.

In addition to the matters stated under section 1 of the petition herein (which in the interest of brevity are not here repeated), under the heading "Summary Statement of the Matter Involved", the following facts are important:

The business of the defendant is that of operating bulk freight steamers between various ports of the United States and between ports of the United States and Canada. It owns and operates ten freight steamers, loading and

unloading cargoes at Minnesota and other ports (R. 24). The business of the defendant is largely, if not entirely, interstate commerce; it maintains a representative in Duluth, Minnesota, who issues bills of lading and reports the movements of the several vessels to the defendant, and loads and unloads its vessels at termini within the State of Minnesota during the navigation season, and operates all of its vessels which touch Minnesota and Wisconsin ports, over approximately ninety miles of water over which the State of Minnesota has territorial jurisdiction.

IV.

Specification of Errors.

The following errors of the Supreme Court of Minnesota are assigned and specified as those intended to be urged:

In affirming the order of the district court granting defendant's motion to vacate and set aside the attachment and summons, and thereafter affirming the final judgment of the district court to the same effect, the Supreme Court of Minnesota erred in holding that the attachment and the service and levy thereof by the sheriff of St. Louis County on July 1, 1932, and the service of summons on the defendant by delivering a copy thereof to Otto Gentz on July 1, 1932, should be vacated and set aside on the ground that such service and the prosecution of said action in the District Court of Minnesota operate to place unreasonable conditions, burdens and restraints upon interstate commerce, in violation of the provisions of Article I, Section 8, subdivision 3, of the Constitution of the United States.

V.

ARGUMENT.

Summary of Argument.

Point A. A Federal question of substance and general importance is involved and this Court should take jurisdiction.

Point B. This is a suit:

1. By a foreign corporation qualified to do business within the state.

2. Against a defendant which is a foreign corporation not qualified to do business within the state, but which operates, in interstate commerce, a fleet of vessels over Minnesota waters.

3. On a cause of action which arose without the state.

Point C. The decision below is contrary to and in conflict with the principles applied by this Court in prior decisions, and the prosecution of the action in Minnesota does not constitute an undue burden upon interstate commerce.

Point A.

A Federal question of substance and general importance is involved and this Court should take jurisdiction.

This Court has had occasion to pass upon the general question here involved, in the six cases which are cited in the annexed petition. Three of them were decided upon certiorari and three upon writ of error. In each of them the question involved was whether the prosecution of the particular action was such a burden upon interstate commerce as to violate the commerce clause; and in each of them a railroad was involved.

The question here presented involves the applicability of the principles announced in these cases, to a carrier which does not operate upon rails. The increasing importance of interstate transportation by watercraft, airplane, bus and truck makes it important to have the law settled by the Court of final authority on this point.

It is and was the contention of the petitioner that the same principles should be applied to an interstate carrier which does not operate upon rails, as have been applied by this Court to interstate railway carriers. We feel that the question is of sufficient general importance to justify us in believing that this Court will take jurisdiction and apply the rules to the present situation which have been applied in the six cases referred to.

In discussing these six cases we shall also refer briefly to certain of the decisions of the Minnesota Supreme Court and other courts which support the principles here contended for, although it is, of course, recognized that these decisions are not in any manner controlling upon this Court.

Point B.

1. *This is a suit by a foreign corporation qualified to do business within the state.*

It is alleged in the complaint (R. 3) and not denied at any place in the record, that the plaintiff is a Delaware corporation having its principal place of business in Minnesota and that it is doing business in this state. The Minnesota Supreme Court assumed, and based its decision upon the assumption, that the plaintiff was duly qualified to do business within Minnesota. This assumption, which is conclusive so far as the present situation is concerned, was no doubt based upon the following decisions of the Minnesota Supreme Court, which hold that compliance with the

statute and due qualification to do business are presumed in the absence of evidence to the contrary:

Fidelity & Casualty Company of New York v. *Eikoff*, 63 Minn. 170, 65 N. W. 351;

Langworthy v. *Garding*, 74 Minn. 325, 77 N. W. 207;

State v. *Murphy*, 113 Minn. 405, 129 N. W. 850;

State ex rel. Miller v. *Reiter*, 140 Minn. 491, 178 N. W. 714.

Thus, in effect, the present suit is brought by a resident plaintiff, for the reason that a foreign corporation qualified and licensed to do business in this state has the same rights relative to the bringing of suits as a resident of the state and a domestic corporation.

G. Heileman Brewing Co. v. *Peimeisl*, 85 Minn. 121, 88 N. W. 441;

Thomas Mfg. Co. v. *Knapp*, 101 Minn. 432, 112 N. W. 989.

2. *This is a suit against a defendant which is a foreign corporation not qualified to do business within the state but which operates, in interstate commerce, a fleet of vessels over Minnesota waters.*

The Columbia Transportation Company, respondent here, is a Delaware corporation with its principal office in Wilmington, Delaware. It maintains an office for the transaction of business in Cleveland, Ohio (R. 23). It is not qualified to do business in the State of Minnesota (R. 24). It owns and operates ten freight steamers (R. 24), loading and unloading cargoes at Minnesota ports, and traverses approximately ninety miles over waters over which the State of Minnesota has territorial jurisdiction (R. 65).

As stated by Mr. Justice Loring in one of the dissenting opinions in the court below:

"Fortunately for the steamship line, it does not have to own right of way or trackage, but it does op-

erate its ships into waters and there dock, load and unload them. This it does with its own crews and employes just as much under its control as if it were operating a railway to convey the same goods or passengers. It brings its property within the state just as effectively and for the same purpose as does a railroad."

3. *This is a suit on a cause of action which arose without the state.*

The gist of the action (R. 3 ff.) is that about January 1, 1930, at South Chicago, Illinois, defendant stored for plaintiff in one of its ships, the "W. C. Richardson", a large cargo of wheat; that the grain was kept in storage until May, 1930, and then transported by defendant to Buffalo, New York; that it was in good order when delivered aboard the "Richardson", but that during the course of storage in South Chicago and transportation down to Buffalo, it was damaged through the negligence of the defendant, in the sum of approximately $20,000. The cause of action thus alleged arose without the State of Minnesota.

POINT C.

The decision below is contrary to and in conflict with the principles applied by this Court in prior decisions, and the prosecution of the action in Minnesota does not constitute an undue burden upon interstate commerce.

A bare majority of the Minnesota Supreme Court ignored or regarded as of no controlling importance, in determining whether this suit imposed an unreasonable burden on interstate commerce, the fact that the defendant here was operating its facilities regularly within the State of Minnesota, as surely as does a railroad.

The following analysis demonstrates clearly, we believe, that this Court, which is the final authority on the question,

regards the fact of operation or non-operation within the state as the key factor. In other words, all of the decisions of this Court hereinafter cited, as well as the decisions of other courts, clearly sustain the proposition that where the defendant is operating within the state, the prosecution of a transitory cause of action against it does not unreasonably burden interstate commerce, *irrespective of the residence of the plaintiff and irrespective of the place where the cause of action arose;* but, where the defendant is not operating within the state (and assuming jurisdiction has been obtained), the prosecution of such an action is an unreasonable burden upon interstate commerce, *unless* the cause of action arose within the state.

It will be noted that all of the cases hereinafter referred to come squarely within this principle and were decided in accordance therewith.

So, in the present case, where jurisdiction has been obtained by ancillary process and the defendant carries on regular operations within the state, even though its operations are interstate in character, the Minnesota Supreme Court should have held that there was no undue burden upon interstate commerce and should have permitted the plaintiff to utilize its home forum for the trial of this cause of action.

We refer briefly to the six cases decided by this Court and analyze them as follows:

Davis v. *Farmers Co-operative Company*, 262 U. S. 312, decided in 1923, was the first case to hold that the commerce clause of the Federal Constitution affects the question of the proper state for trial. In that case, a Kansas corporation brought suit in a state court of Minnesota, against the Director General as agent of the Santa Fe Railroad, another Kansas corporation, to recover for loss of grain in transit between two points in Kansas. The rail-

road did not own or operate a line in Minnesota, but it maintained an agent there for the solicitation of traffic. The State of Minnesota permitted service of process upon such an agent. This Court held this statute to be invalid as a violation of the commerce clause. Thus the doctrine was established that an unreasonable burden might be placed on interstate commerce by subjecting a carrier to legal proceedings in a state where it did not operate. In the *Davis* case, (*a*) plaintiff was a nonresident; (*b*) defendant was a nonresident; (*c*) defendant neither owned nor operated a railway within the state; (*d*) the cause of action arose outside of Minnesota.

This Court, in the *Davis* case, however, specifically points out that,

> "A foreign corporation engaged exclusively in interstate commerce is not, because of that fact, immune from the ordinary processes of the courts of a state where its business is entirely interstate in character, *International Harvester Co. v. Kentucky*, 234 U. S. 579. It must submit, as to jurisdiction, to the requirements of orderly, effective administration of justice, although thereby interstate commerce is incidentally burdened."

The present case differs from the *Davis* case in the following respects: (*a*) here the plaintiff, in contemplation of law, is a resident of the state, while in the *Davis* case the plaintiff was a nonresident; (*b*) in the present case, the defendant operates a line of vessels to Minnesota ports and over Minnesota waters, while in the *Davis* case it neither owned trackage nor operated within the state.

The next case decided by this Court was *Atchison, T. & S. F. R. Co.* v. *Wells*, 265 U. S. 101. The decision followed the *Davis* case for the reason that the controlling features were precisely similar to those in the *Davis* case.

The next case decided by this Court was *Missouri ex rel. St. Louis B. & M. R. Co.* v. *Taylor*, 266 U. S. 200. Here the plaintiff was a foreign corporation doing business in Missouri—in other words, a resident. The defendant was a Texas corporation not doing business in Missouri. The action was for damages to a shipment of goods deliverable in Missouri; and jurisdiction was acquired by garnishment of traffic balances due from an interstate carrier having a place of business in Missouri and, "for aught that appears" the negligence complained of occurred in Missouri. Under these circumstances, this Court held that the garnishment and prosecution of the action in Missouri did not unduly burden interstate commerce.

The main differences between the *Taylor* case and the present case are: (*a*) the defendant in the *Taylor* case did not operate within the state, while in the present case it does; and (*b*) in the Taylor case the cause of action was assumed to have arisen within the state, while in the present case it concededly arose without the state.

Still later this Court decided *Hoffman* v. *Missouri ex rel. Foraker*, 274 U. S. 21, which was an action in the State of Missouri, by a resident of Kansas, to recover for a wrongful death which occurred in Kansas, against a Missouri railroad. Under this state of facts, this Court held the burden not to be unreasonable.

The principal differences between the *Hoffman* case and the present case are as follows: (*a*) in the *Hoffman* case the plaintiff was a nonresident, while here it is a resident; (*b*) in the *Hoffman* case the defendant was a resident operating within the state, while here it is a nonresident operating within the state.

Next was decided *Michigan Central Railway Co.* v. *Mix*, 278 U. S. 492, in which the plaintiff was a resident of Michigan, who removed to Missouri after the cause of action accrued and before the suit was brought she became a resi-

dent of that state. The defendant was a Michigan corporation and the action was commenced in Missouri. The defendant railroad did not have a line in Missouri but maintained only a soliciting agent. The cause of action accrued in Michigan. The Court held the suit, under these circumstances, to be an unreasonable burden on interstate commerce.

Thus, the principal differences between the *Mix* case and the present case are: (*a*) in the *Mix* case the plaintiff was a nonresident of the state, who moved into the state after the cause of action accrued, while in the present case the plaintiff is a resident; and (*b*) in the *Mix* case, the defendant neither owned nor operated a line within the state, while in the present case the defendant operates a line of vessels to Minnesota ports and over Minnesota waters.

The latest case, so far as we know, to be decided by this Court, wherein the present question was involved, was *Denver & R. G. W. Ry. Co.*, v. *Terte*, 284 U. S. 284. The action was for damages under the Employers' Liability Act. The plaintiff was injured in Colorado but became a *bona fide* resident and citizen of Missouri after the cause of action arose. Negligence was charged jointly against the Santa Fe and the Rio Grande railroads. The Rio Grande was a Delaware corporation, neither owning nor operating a line in Missouri and not qualified to do business there, but maintaining an agent for traffic solicitation. The Santa Fe was a Kansas corporation, both owning and operating a line in Missouri and duly qualified to do business in Missouri. Jurisdiction of the Rio Grande was obtained by attachment. This Court held that the suit against the Santa Fe did not constitute an undue burden upon interstate commerce, but that the suit against the Rio Grande did.

Thus, we have the following differences between the *Terte* case and the present case: First, as to the Santa Fe: (*a*) in the *Terte* case the plaintiff became a resident of the

state after the cause of action arose, and in the present case the plaintiff is a resident; (*b*) in the *Terte* case the defendant Santa Fe was a resident, while in the present case the defendant is a nonresident. As to the Rio Grande, we have the same difference as to the party plaintiff and, in addition, the defendant Rio Grande neither owned nor operated a line within the state, whereas in the present case the defendant operates a line of vessels over Minnesota waters.

From the foregoing analysis, it is evident that this Court has not passed upon the precise situation here involved, where we have a suit (*a*) by a resident plaintiff, (*b*) against a foreign corporation, (*c*) operating in the state, (*d*) on a cause of action which arose outside the state. However, under this state of facts the Supreme Court of Arkansas held that there was no unreasonable burden upon interstate commerce, in *American Railway Express Co.*, v. *Rouw Co.*, 173 Ark. 710, 294 S. W. 401.

From the decisions of this Court there emerge certain general principles which appear to us to be clearly deducible. Those principles are as follows:

Where the defendant is operating within the state wherein a suit upon a transitory cause of action is brought, the prosecution of the action does not unduly burden interstate commerce, regardless of the residence of the plaintiff and regardless of where the cause of action arose; but where the defendant is not operating in the state and jurisdiction can be obtained, the cause of action must have arisen within the state or it is an undue burden upon interstate commerce.

This rule fits all of the cases decided by this Court, as well as the cases decided by other courts, including the Supreme Court of Minnesota.

It is clear that the mere question of convenience or inconvenience of transporting witnesses to the state where jurisdiction is sought is not controlling, for in the *Hoffman* case *supra*, witnesses were to be taken from Kansas to Missouri; and in the *Terte* case, *supra*, as to the Santa Fe, the witnesses were to be taken from Colorado to Missouri. In fact, this Court has expressly repudiated convenience or inconvenience of the parties as a determining factor by the following language from the *Terte* case:

> "Courts could not undertake to ascertain in advance of the trial the number and importance of probable witnesses within and without the state, and retain or refuse jurisdiction, according to the relative inconvenience of the parties."

The fact that the cause of action arose outside the state was not alone controlling in either the *Hoffman* case or the *Terte* case. Furthermore, in neither of those cases did the transaction out of which the cause of action arose take place in the state where the suit was brought. Yet in both cases the burden was held not to be unreasonable.

Again, in *Michigan Central* v. *Mix*, *supra*, and as to the Rio Grande in the *Terte* case, the residence of the plaintiff was not alone sufficient to eliminate the burden; nor was his nonresidence sufficient to impose it in the *Hoffman* case.

It would seem, therefore, that according to these decisions, the residence of a plaintiff in itself is immaterial as to the question of burden on interstate commerce, although in the present case, if any weight is given to it, such weight should be favorable to the plaintiff because it is a resident.

The inconvenience or convenience of witnesses cannot alone be controlling, because in the *Hoffman* case, even though witnesses were required from outside the state on a foreign cause of action, and even though securing the presence of those witnesses would greatly inconvenience

the carrier and cause expense probably as great as the inconvenience and expense in the *Davis* case, the court held that there was no burden on interstate commerce because the defendant operated in the State of Missouri. It is true that it was also incorporated in Missouri; but undoubtedly this was not considered important, as this factor could in no manner affect interstate commerce. It is no more burdensome to defend a suit where the interstate carrier is not incorporated than where it is incorporated, if the cause of action in both cases arose at a remote place.

An analysis of the above cited cases, and particularly of the *Terte* case, demonstrates that the ultimately controlling factor is the operation or non-operation of its facilities by the defendant within the state. As said by Mr. Justice Loring in his dissenting opinion in the court below:

> "In that case (the *Terte* case) an employe at an interlocking track and signal plant, after acquiring a *bona fide* residence in Missouri, sued, in that state, the Rio Grande Railroad and the Santa Fe, by both of which he had been employed, for injuries received in Colorado. The Santa Fe was a Kansas corporation licensed to operate its railroad in Missouri, whereas the Rio Grande operated no road in that state. Jurisdiction of the latter was sought by garnishment of traffic balances owed it by several railroad companies. It was held that a trial in Missouri would unreasonably burden interstate commerce as to the Rio Grande but not as to the Santa Fe. If the bringing of witnesses from Colorado were the controlling feature of the burden upon commerce, it was equally as burdensome for the Santa Fe as for the Rio Grande. Evidently we must look farther for the controlling distinction. The Santa Fe although a foreign corporation operated a railroad in Missouri. On the authority of *Hoffman* v. *Missouri ex rel. Foraker*, 273 U. S. 21, 71 L. Ed. 905, the court said the burden on the Santa Fe

was not unreasonable. Hoffman was a resident of Kansas suing a Missouri railroad for injuries received on its line in Kansas. One of the controlling considefations moving the Supreme Court to hold the burden not unreasonable was the operation of the defendant's road in Missouri. True it was a Missouri corporation, but the state of incorporation is not controlling, because in the *Ferte* case the Santa Fe was a nonresident, though licensed in Missouri. If the taking of witnesses from one state to another were the controlling consideration, the residence of the defendant would make no difference.

"*If any logical deduction can be drawn from the various cases, it seems to me that the operation of a railroad within the state where jurisdiction is sought is the important and controlling consideration.* So far as commerce is concerned, I cannot see the distinction between operating a railroad into a state, as did the Santa Fe in the *Terte* case, and operating a line of steamships into one of its ports as in the case at bar." (Italics ours.)

The situation including the reason for the rule is further tersely summed up by Mr. Justice Olson in his dissenting opinion, in which he says:

"I dissent on the ground that by the attachment of property within this state jurisdiction to the extent of such property was acquired and where a foreign corporation brings its property here and jurisdiction is acquired over it, the interference, if any, with interstate commerce is but incidental and in fact invited by the defendant. *Rosenblet* v. *Pere Marquette R. Co.*, 162 Minn. 55."

In the *Rosenblet* case last above cited, the appeal to the Minnesota Supreme Court was from an order denying the motion of the defendant to set aside the service of a summons, and denying a motion to vacate the attachment proceeding. The defendant was a foreign railroad cor-

poration not operating within the state. Plaintiff, a Minnesota resident, attempted to obtain jurisdiction by the service of summons on a soliciting freight agent of the defendant, who maintained an office in Minneapolis; but the court held that this was ineffectual, for the reason that the defendant was not doing business within the state, other than such interstate commerce business as is done by a soliciting agent and which, under the decision in the *Davis* case, it may do without subjecting itself to the jurisdiction of our courts.

However, the defendant had property within this state which was attached. This property was being used in the interstate business of the defendant. No claim was made of any irregularity in the attachment proceeding.

> "Hence," says the court, "under our statute jurisdiction has unquestionably been acquired of defendant to the extent of the value of the property attached, provided it is subject to attachment. This presents the sole question in the appeal."

It was the contention of the defendant in the *Rosenblet* case that since it was permissible for a foreign carrier of this kind to maintain its soliciting agent in Minnesota without thereby subjecting it to the jurisdiction of Minnesota courts, through service upon such agent, as held in the *Davis* case, the interference with the defendant's property by the attachment unreasonably burdened or interfered with interstate commerce. The Minnesota Supreme Court, in ruling contrary to this contention, makes the following statement:

> "That property is used in interstate commerce does not render it immune from seizure by attachment or garnishment was settled in *Davis* v. *Cleveland, C. C. & St. L. Ry. Co.*, 217 U. S. 157, 30 Sup. Ct. 463, 54 L. Ed. 708, 27 L. R. A. (N. S.) 823, 18 Ann. Cas. 907. But

> the use of such means of reaching a foreign carrier engaged in interstate commerce may or may not be a wrongful interference, depending upon the circumstances of the case. * * * This cause of action accrued in this state to a consignee of the shipment residing herein, and for which defendant is liable as initial carrier, under the Carmack amendment. The use of the writ of attachment to acquire jurisdiction of property of defendant to satisfy this cause of action cannot be a wrongful interference with interstate commerce. *With more propriety it may be said to be a proper use by the owner of property so transported to obtain redress against the wrongful acts of the carrier transporting the same.*" (Italics ours.)

That the Supreme Court of Minnesota has heretofore followed the principles which we contend for herein and which have been announced by this Court, is evidenced by the following decisions of the Minnesota Supreme Court, wherein the question of whether the particular action involved was an unreasonable burden on interstate commerce, was at issue.

State, ex rel. Schendel v. *District Court,* 156 Minn. 380, 194 N. W. 780;

Erving v. *Chicago & N. W. Railway Co.,* 171 Minn. 87, 214 N. W. 12;

Boright v. C., R. I. & P. Ry. Co., 180 Minn. 52, 230 N. W. 457.

Conclusion.

In view of the general importance of the question sought to be submitted to this Court, involving, as it does, a substantial Federal question which has been decided by the Minnesota Supreme Court contrary to the principles laid down by this Court, it is respectfully submitted that this case is one calling for the exercise by this Court of its

supervisory powers, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Minnesota Supreme Court and finally reverse it.

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